

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

PAMELA STERK,	)	
	)	No. CV-04-3109-CI
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND DIRECTING ENTRY OF
JO ANNE B. BARNHART,	)	JUDGMENT FOR DEFENDANT
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 9, 13), submitted for disposition without oral argument on April 11, 2005. Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Joanne E. Dantonio represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

Plaintiff, who was 51-years-old at the time of the administrative decision, filed applications for Social Security disability benefits on January 19, 2001, and protectively filed for Supplemental Security Income benefits on December 26, 2000, alleging onset as of December 26, 1999, due to physical and mental

1 impairments. (Tr. at 208.) Plaintiff completed the eleventh grade  
2 with one year of vocational training and past work experience as a  
3 sales clerk, seamstress, care giver, cashier, and babysitter. (Tr.  
4 at 82.) Following a denial of benefits and reconsideration, a  
5 hearing was held before ALJ Edward Nichols (ALJ). The ALJ denied  
6 benefits after concluding Plaintiff was able to perform her past  
7 relevant work as a cashier or seamstress. Review was denied by the  
8 Appeals Council. This appeal followed. Jurisdiction is appropriate  
9 pursuant to 42 U.S.C. § 405(g).

#### 10 PRIOR APPLICATIONS

11 Plaintiff previously filed concurrent disability and SSI  
12 applications on December 16, 1994; those applications were initially  
13 denied and then adjudicated by ALJ Denny Allen. The ALJ found  
14 Plaintiff was disabled due to carpal tunnel syndrome for a closed  
15 period between December 7, 1994, and May 1, 1996. No appeal was  
16 taken from that decision.

17 In the process of addressing the current applications, ALJ  
18 Nichols found Plaintiff had an unadjudicated period of disability  
19 from May 24, 1996, to the onset date alleged in the present  
20 application of December 26, 1999; under *Chavez v. Bowen*, 844 F.2d  
21 691 (9<sup>th</sup> Cir. 1988) and Acquiescence Ruling 97-4(9), a presumption  
22 arose of continuing non-disability following the end of the closed  
23 period until the new onset date. ALJ Nichols found Plaintiff had  
24 not rebutted the presumption and the prior closed period of  
25 disability remained the law of the case. There is no challenge to  
26 this finding.

#### 27 ADMINISTRATIVE DECISION

28 The ALJ concluded Plaintiff met the disability insured

1 requirements through March 31, 2001. She had not engaged in  
2 substantial gainful activity due to severe impairments including  
3 degenerative disc disease of the lumbar spine, hepatitis C, and drug  
4 use/abuse, but those impairments were found to not meet the  
5 Listings. The ALJ concluded Plaintiff's carpal tunnel syndrome  
6 following surgery, and allegations of memory loss and depression  
7 were non-severe. (Tr. at 21.) The ALJ concluded Plaintiff's  
8 testimony was not fully credible and that she retained the residual  
9 capacity to perform light work. (Tr. at 25.) The ALJ found  
10 Plaintiff was able to perform her past relevant work as a cashier  
11 and seamstress. Thus, there was no finding of disability.

#### 12 ISSUES

13 The question presented is whether there was substantial  
14 evidence to support the ALJ's decision denying benefits and, if so,  
15 whether that decision was based on proper legal standards. Plaintiff  
16 asserts the ALJ erred when he (1) improperly rejected the opinion of  
17 the treating physician and (2) failed to conduct a proper step four  
18 analysis.

#### 19 STANDARD OF REVIEW

20 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
21 court set out the standard of review:

22 The decision of the Commissioner may be reversed only if  
23 it is not supported by substantial evidence or if it is  
24 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,  
25 1097 (9th Cir. 1999). Substantial evidence is defined as  
26 being more than a mere scintilla, but less than a  
27 preponderance. *Id.* at 1098. Put another way, substantial  
28 evidence is such relevant evidence as a reasonable mind  
might accept as adequate to support a conclusion.  
*Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
evidence is susceptible to more than one rational  
interpretation, the court may not substitute its judgment  
for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
*Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599

(9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

#### SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

#### ANALYSIS

##### 1. Treating Physician

Plaintiff asserts the ALJ failed to properly reject the

1 opinions of her treating physicians, Sophie Gomez, M.D. and Shirley  
2 Mauch, D.O., who concluded Plaintiff was limited to sedentary work  
3 due to degenerative disease of the lumbar and cervical spine and  
4 left ankle weakness. (Tr. at 137-40 (Gomez, August 1995), 305-06  
5 (Mauch, January 2001), 311-12 (Mauch, April 2001), 339-40 (Mauch,  
6 June 2001).) Plaintiff contends this conclusion is supported by a  
7 1995 CT scan which revealed spondylosis of the cervical spine,  
8 uncovertebral spurring, and diffuse bulging of the lumbar spine.  
9 Plaintiff further argues the ALJ improperly rejected any limitations  
10 associated with her carpal tunnel syndrome; Dr. Mauch concluded  
11 Plaintiff suffered from bilateral hand weakness constituting a  
12 marked impairment. (Tr. at 305, 311, 339.) Additionally,  
13 consultant Dr. Norm Staley concluded in August 2001 Plaintiff was  
14 limited in fine manipulation and fingering skills secondary to her  
15 history of carpal tunnel syndrome. Finally, Plaintiff contends the  
16 ALJ improperly rejected Dr. Mauch's consistent findings of  
17 depression and memory loss, confirmed by Dr. Toews. (Tr. at 305,  
18 311, 339.) Moreover, the agency found in February 1997 that  
19 Plaintiff's depression met or equaled the Listings. (Tr. at 179-  
20 80.)

21 In a disability proceeding, the treating physician's opinion is  
22 given special weight because of his familiarity with the claimant  
23 and his physical condition. See *Fair v. Bowen*, 885 F.2d 597, 604-05  
24 (9th Cir. 1989). If the treating physician's opinions are not  
25 contradicted, they can be rejected only with clear and convincing  
26 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If  
27 contradicted, the ALJ may reject the opinion if he states state  
28 specific, legitimate reasons that are supported by substantial

evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605. While a treating physician's uncontradicted medical opinion will not receive "controlling weight" unless it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques," Social Security Ruling 96-2p, it can nonetheless be rejected only for "'clear and convincing' reasons supported by substantial evidence in the record." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)). Historically, the courts have recognized conflicting medical evidence, the absence of regular medical treatment during the alleged period of disability, and the lack of medical support for doctors' reports based substantially on a claimant's subjective complaints of pain, as specific, legitimate reasons for disregarding the treating physician's opinion. See *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604. Here, the opinions of the treating physicians are contradicted by the opinions of the examining physicians.

A. Mental Impairment

In his decision, the ALJ chose to rely on the opinion of the examining physicians, Drs. Toews, Beaty, and Kester who concluded mental impairments were non-severe. (Tr. at 410.)

With respect to mental limitations, the ALJ noted:

...I cannot credit the claimant on her allegations of depression and memory difficulties. While the claimant's treating doctor alluded to depression, it was not diagnosed by any mental health professional. The claimant professes anhedonia, but she is out and about doing shopping and child care, and she claims to read a lot.

...

...Moreover, the claimant's case is not helped by the fact that she basically has no mental health treatment despite

1 her allegations of profound handicap due to memory  
2 difficulties. One would think if she were so distressed,  
she would seek treatment.

3 (Tr. at 22, 23, references to exhibits and cases omitted.) These  
4 findings are legitimate and specific and supported by the record.  
5 *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604.

6 Although the agency opined in 1997 that Plaintiff's mental  
7 impairments<sup>1</sup> were serious enough to meet the Listings absent a  
8 finding of materiality of her drug and alcohol dependence, and, as  
9 a result, she may have been entitled to an open period of benefits,  
10 that opinion was rejected by the Appeals Council. (Tr. at 179-181.)  
11 Plaintiff did not appeal the award of a closed period of benefits;  
12 her date of onset alleged in the instant application is December  
13 1999. Thus, the non-medical opinion offered by agency personnel in  
14 1997 is not persuasive.

15 Although Dr. Mauch consistently noted depression and memory  
16 loss in her evaluations for DSHS purposes, there are no clinic notes  
17 or objective testing to support these diagnoses. Additionally,  
18 although Plaintiff indicated she was taking Prozac at the time of  
19 the administrative hearing (Tr. at 498) and that the dose had been  
20 increased, there are no records indicating such a prescription. The

21 \_\_\_\_\_  
22 <sup>1</sup>It appears the agency was relying on findings by Dr. Beaty in  
23 March 1995 that Plaintiff would have several moderate limitations  
24 due to personality disorder and substance abuse (heroin addiction).  
25 (Tr. at 38-39.) The agency's opinion was based on regulations which  
26 permitted an award of benefits for substance addiction. The law has  
27 since been amended so that benefits will be denied if substance  
28 abuse is material to a finding of disability.

1 prescription record provided to Central Washington Comprehensive  
2 Mental Health disclosed only Celebrex. (Tr. at 383.)

3 The record further discloses Plaintiff was fairly active with  
4 family life and household chores. (Tr. at 314, 246.) Dr. Toews,  
5 during his examination, noted Plaintiff was independent for  
6 activities of daily living, and spent her time reading, walking,  
7 assisting her grandchildren with getting ready for school, and doing  
8 household chores. Plaintiff was fully oriented, her attention and  
9 concentration and Trails tests were within normal limits. (Tr. at  
10 314.) Results of memory testing were suspect, indicative of  
11 motivation problems. Dr. Toews' also noted Plaintiff was suffering  
12 from methadone withdrawal and deconditioning and that she would  
13 benefit from an assessment and medication treatment for depression.  
14 (Tr. at 316.) He assessed her global assessment of functioning  
15 (GAF) at 52, indicative of moderate impairment, after diagnosing  
16 methadone withdrawal, substance induced mood disorder, rule out  
17 exaggeration of memory problems. (Tr. at 316.) DIAGNOSTIC AND  
18 STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION (DSM-IV), at 32 (1995).  
19 Based on the diagnosis, the record reflects the moderate limitations  
20 may have been due to substance withdrawal, not depression or memory  
21 impairment. The opinion of an examining physician, when supported  
22 by independent clinical findings, constitutes substantial evidence.  
23 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

24 A review of records from Central Washington Comprehensive  
25 Mental Health dated July 2001 indicates treatment only for a re-  
26 occurrence of heroin addiction following termination of methadone  
27 treatments. (Tr. at 375-393.) Plaintiff did not report emotional  
28 problems and described her mood as "good." (Tr. at 389.) The goal



1 of the treatment plan was to assist with total remission of her  
2 addiction. (Tr. at 393.)

3 At step two of the sequential process, the ALJ must conclude  
4 whether Plaintiff suffers from a "severe" impairment, one which has  
5 more than a slight effect on the claimant's ability to work. To  
6 satisfy step two's requirement of a severe impairment, the claimant  
7 must prove the existence of a physical or mental impairment by  
8 providing medical evidence consisting of signs, symptoms, and  
9 laboratory findings; the claimant's own statement of symptoms alone  
10 will not suffice. 20 C.F.R. §416.908. The effects of all symptoms  
11 must be evaluated on the basis of a medically determinable  
12 impairment which can be shown to be the cause of the symptoms. 20.  
13 C.F.R. § 416.929. Once medical evidence of an underlying impairment  
14 has been shown, medical findings are not required to support the  
15 alleged severity of pain. *Bunnell v. Sullivan*, 947 F.2d 341, 345  
16 (9th Cir. 1991). However, an overly stringent application of the  
17 severity requirement violates the statute by denying benefits to  
18 claimants who do meet the statutory definition of disabled. *Corrao*  
19 *v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the  
20 Commissioner has passed regulations which guide dismissal of claims  
21 at step two. Those regulations state an impairment may be found to  
22 be not severe *only* when evidence establishes a "slight abnormality"  
23 on an individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303,  
24 306 (9th Cir. 1988) (citing Social Security Ruling 85-28). The ALJ  
25 must consider the combined effect of all of the claimant's  
26 impairments on the ability to function, without regard to whether  
27 each alone was sufficiently severe. See 42 U.S.C. §  
28 423(d)(2)(B)(Supp. III 1991). The step two inquiry is a *de minimis*

1 screening device to dispose of groundless or frivolous claims.  
2 *Bowen v. Yuckert*, 482 U.S. 137, 153-154. The ALJ did not err in  
3 rejecting Plaintiff's mental impairments as non-severe; there is no  
4 objective medical evidence to support limitations attributable to  
5 depression and memory loss.

6 2. Physical Impairment

7 The ALJ also relied on the findings of examining physician, Dr.  
8 James Damon, who concluded there were no objective findings on which  
9 to base physical limitations. (Tr. at 20-21.) With respect to the  
10 physical limitations noted by Dr. Mauch, the ALJ found:

11 No treating source has restricted the claimant from all  
12 work activity. Dr. Mauch consistently restricted the  
13 claimant to sedentary work on her check-box forms for  
14 general assistance welfare purposes. However, this is not  
15 supported by her minimal examination documentation. For  
16 example on examination in July 2000, she noted continued  
lumbar paravertebral muscle tenderness to palpation and  
movement without evidence of any neurovascular deficits.  
In short, these appear to be opinions of accommodation to  
enhance claimant's opportunities to obtain funding as  
opposed to well supported assessments of her abilities.

17 (Tr. at 24, references to exhibits omitted.) These findings are  
18 specific and legitimate and supported by the record.

19 A brief or conclusory opinion by a treating physician is not  
20 entitled to persuasive weight. *Young v. Heckler*, 803 F.2d 963, 968  
21 (9th Cir. 1986). Dr. Mauch's summary conclusion Plaintiff was  
22 limited to sedentary work is not supported by clinical findings.  
23 Although there is a CT scan dated 1995 indicating mild spondylosis  
24 at C5-6 with mild uncovertebral spurring and degenerative disc  
25 disease at L4-5 with hypertrophic facet arthrosis at L4-5, L4-S1,  
26 there are no objective tests which demonstrate deterioration of  
27 Plaintiff's condition in 1999, the new onset date. (Tr. at 126.)  
28 Moreover, Plaintiff exhibited positive Waddell's signs, evidence of

1 malingering. (Tr. at 338.) Finally, Plaintiff indicated to Dr.  
2 Mauch in 2000 that she was working currently as a child care  
3 provider and that her pain medication had dropped her pain level  
4 from ten to four. (Tr. at 351.) Plaintiff reported again in August  
5 2001 that she was feeling well as a result of her pain medication.  
6 (Tr. at 442.) Dr. Mauch opined there was a correlation between  
7 Plaintiff's access to methadone and her complaints of back pain.  
8 (Tr. at 353.)

9 Dr. Damon, who examined Plaintiff in 2001, found normal gait,  
10 heel and toe walk, tandem gait, an ability to squat and rise, and no  
11 evidence of spasm. (Tr. at 307.) Plaintiff's range of motion was  
12 within normal limits, her grip strength was tested at 45 pounds, and  
13 her finger-thumb interaction was normal. (Tr. at 307-308.) Dr.  
14 Damon concluded there were no objective findings resulting in no  
15 limitations. As noted earlier, the findings of an examining  
16 physician when supported by independent clinical tests, are  
17 substantial evidence. *Magallanes*, 881 F.2d at 751.

## 18 2. Rejection of Lay Witness Testimony

19 Plaintiff contends the ALJ did not properly reject the  
20 observations of the lay witness, Plaintiff's daughter who provided  
21 observations particularly with respect to Plaintiff's depression.  
22 (Tr. at 507-509.) Ms. Moore stated her mother did not participate  
23 in family activities, did not socialize, and spent her time watching  
24 television and sleeping. Ms. Moore also stated she assisted her  
25 mother with taking showers.

26 "[L]ay witness testimony as to a claimant's symptoms or how an  
27 impairment affects ability to work is competent evidence and  
28 therefore cannot be disregarded without a statement reasons that are

germane to each witness." *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993) (other citations omitted). The ALJ referred to Ms. Moore's testimony and indicated Plaintiff's decision to spend her time in the house was a volitional choice, or due to finances and not to any medical impairment documented in the record. The ALJ noted Plaintiff had "managed to work" buying illicit drugs until a year before his decision. (Tr. at 24.) The record does not disclose a diagnosis of depression based on a clinical examination or testing. Thus, the ALJ's rejection that Plaintiff's lack of activity was not caused by a medical impairment is supported by the record.

### 3. Step Four Analysis

Plaintiff contends the ALJ failed to conduct an adequate step four analysis as required by Social Security Ruling (SSR) 82-62. That ruling necessitates findings of fact as to the claimant's residual functional capacity, the physical and mental demands of the past work, and a finding the RFC would permit a return to the past work. The ALJ concluded Plaintiff was capable of performing light work (functional capacity to lift and carry a maximum of 20 pounds, stand and walk for about six hours, and sit for about two hours in an eight-hour workday), that she had past relevant work as a cashier and seamstress (activity that was within the limits of her current RFC, see Tr. at 51), and that she could return to that past relevant work as previously performed by her. (Tr. at 24.) Were this court to conclude the ALJ improperly found Plaintiff's work as a seamstress to be SGA (Tr. at 72), the error by the ALJ is harmless because Plaintiff also had past relevant work at the SGA level as a

1 cashier. *Curry v. Sullivan*, 925 F.2d 1127, 1129 (9<sup>th</sup> Cir. 1991)  
2 (whether findings of fact are supported by substantial evidence or  
3 the law was correctly applied by the ALJ are questions subject to  
4 the harmless error standard).

5 Plaintiff contends the ALJ erred when he concluded she could  
6 perform light work, based on the limitations noted by Drs. Gomez and  
7 Mauch. As noted above, Dr. Damon's examination provides support for  
8 the limitation to light work, including an ability to perform fine  
9 finger manipulation. As discussed previously, the ALJ correctly  
10 concluded there were no severe mental impairments. The record  
11 supports a finding Plaintiff performed work at the SGA level as a  
12 cashier.<sup>2</sup> (Tr. at 214, 215, 218.) Plaintiff last worked in 2000,  
13 after the alleged onset date, as a cashier; Plaintiff was fired from  
14 that job, not because of disability but because she could not work  
15 Saturdays. (Tr. at 386.) Thus, the ALJ did not error in concluding  
16 Plaintiff could perform her past relevant work as a cashier.  
17 Accordingly,

18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is  
20 **DENIED**; the Complaint and claims are **DISMISSED WITH PREJUDICE**.

21 2. Defendant's Motion for Summary Judgment dismissal (**Ct. Rec.**  
22 **13**) is **GRANTED**.

23  
24 <sup>2</sup>The DICOT definition of cashier, 211.462-014, provides for  
25 only occasional stooping, kneeling and crouching, with no climbing,  
26 or balancing. Finger dexterity required is that used by the middle  
27 one-third of the population; constant fingering (more than 2/3 of  
28 the time) is required also .

S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE